STATE OF MICHIGAN

COURT OF APPEALS

HOPE D'ASCENZO,

Plaintiff-Appellee,

v

PASQUALE RUDOLFO D'ASCENZO,

Defendant-Appellant,

and

EDWARD L. HAROUTUNIAN,

Intervening Plaintiff-Appellee.

UNPUBLISHED
May 6, 2003

No. 230077
Wayne Circuit Court
LC No. 99-913262-DO

HOPE WONSER,

Plaintiff-Appellee,

v

PASQUALE RUDOLFO D'ASCENZO,

Defendant-Appellant.

No. 239679
Wayne Circuit Court
LC No. 99-913262-DO

Before: Griffin, P.J., and Neff and Gage, JJ.

PER CURIAM.

These cases, consolidated for appeal, stem from a divorce action involving plaintiff and defendant. In Docket No. 239679, defendant appeals by leave granted from the trial court's order denying his motion to set aside a November 12, 1999, "Order Regarding Binding Arbitration," which reflected the parties' consent agreement to enter into binding arbitration to resolve property division issues. In Docket No. 230077, defendant appeals from the trial court's entry on September 14, 2000, of an Eligible Domestic Relations Order (EDRO) authorizing the court-appointed receiver to attach a lump sum from defendant's City of Detroit pension plan in

order to collect outstanding attorney and receiver fees, sanctions, and other sums owed by defendant to plaintiff pursuant to the judgment of divorce. We affirm.

I

Plaintiff filed her complaint for divorce in April 1999. The parties had been married twenty-seven years and had no children. On November 12, 1999, the trial court entered an order, pursuant to the parties' consent agreement, to participate in binding arbitration. At that arbitration in January 2000, the parties reached a settlement agreement that awarded plaintiff $20,000 toward her attorney fees, $5,000 in personal property, and a 1998 Chevrolet Silverado. Defendant agreed to transfer title to the Chevrolet to plaintiff within thirty days of the entry of judgment. In addition, the parties agreed that each would take their own pensions "free and clear," with the exception of $93,600, which was to be distributed to plaintiff from two American Fund accounts held by defendant. The settlement agreement provided that plaintiff would have a lien on defendant's share of the assets to insure payment of her attorney fees and the $5,000 in personal property.

A judgment of divorce incorporating the terms of the settlement agreement was entered on February 18, 2000. At the hearing regarding the entry of the judgment of divorce, plaintiff indicated to the trial court that defendant was endeavoring to sell the 1998 Chevrolet Silverado in contravention of the terms of the settlement agreement and corresponding judgment of divorce by placing an ad in the community newspaper. As a result, the trial court ordered defendant to deliver the truck and a cashier's check for $25,000 ($20,000 for attorney fees and $5,000 for personal property) to plaintiff's attorney by February 23, 2000. The trial court, in response to defendant's failure to comply with the settlement agreement, further ordered that defendant pay an additional $5,500 in attorney fees and $1,500 in sanctions to plaintiff by March 17, 2000, and placed a lien on all of his property to insure his compliance. In this regard, the order for entry of judgment of divorce stated in pertinent part:

> Plaintiff shall have a lien against any and all of the Defendant's real and personal property, whether tangible or intangible, including his City of Detroit Pension and Annuity until these amounts are paid in full and a complete transfer of all remaining assets have been completed or until further order of the court.

Defendant neither timely paid plaintiff the sums required under the judgment nor transferred the truck to her. Plaintiff then sought relief with the trial court and at the ensuing hearing on March 10, 2000, the court imposed further sanctions and attorney fees and appointed attorney Edward Haroutunian as receiver "over all of the property and assets of Defendant," including real, personal, tangible or intangible property, as well as the City of Detroit General Retirement Plan, Defined Benefit Plan, and Defined Contribution Plan. The order appointing receiver empowered Mr. Haroutunian to "perform all necessary acts that the Defendant . . . could do if personally present to satisfy the obligation of the Defendant . . . to Plaintiff . . . ."[1] The court also ordered defendant to deliver the Chevrolet Silverado to plaintiff, and if he failed to do

[1] On appeal, defendant does not contest the appointment of the receiver pursuant to MCL 600.2926.

so, the court ordered that plaintiff could determine the value of the truck by affidavit of the court-ordered arbitrator and the receiver could collect this value of the truck from defendant.

On April 13, 2000, defendant filed for relief under Chapter 13 of the United States Bankruptcy Code. In July 2000, his bankruptcy petition was ultimately dismissed by the bankruptcy court based on defendant's bad faith failure to disclose all assets.

Plaintiff thereafter filed a motion for payment of attorney fees and costs necessitated by the bankruptcy action and her continued efforts to have defendant satisfy his obligations under the judgment. By order dated August 4, 2000, the trial court granted the motion and awarded plaintiff an additional $16,957.50 in attorney fees, as well as $10,000 in sanctions. The court-appointed arbitrator submitted an affidavit and the trial court set the value of the Chevrolet Silverado at $20,585. The court ordered the receiver to collect these additional amounts from defendant pursuant to the court's previous order appointing a receiver.

In late August 2000, the receiver filed a motion for entry of an EDRO and entry of an order allowing receiver fees and costs and requiring the receiver to obtain and disburse certain funds. In his motion, the receiver sought, and was granted by the court, $16,678.10 from defendant, representing his fees to date. With regard to his motion for entry of an EDRO, the receiver requested that a lump sum of $123,525.75 be distributed from defendant's City of Detroit pension plan to plaintiff. This amount represented the sums due and owing to plaintiff pursuant to the judgment of divorce, the receiver's fees and costs, cumulative attorney fees, sanctions, and defendant's anticipated federal income tax obligations. On September 14, 2000, the trial court granted the receiver's motion and entered an EDRO, ordering the City of Detroit to distribute the lump sum of $123,525.75 from defendant's City of Detroit pension plan to plaintiff as alternate payee under the eligible domestic relations order act (EDRO Act), MCL 38.1701 *et seq*. The EDRO, which was "incorporated in the Judgment of Divorce . . . and made a part thereof," also provided that defendant was responsible for all federal, state, and local tax obligations. Defendant now appeals by leave granted.

II

In Docket No. 239679, defendant, acting in propria persona, appeals the order of the trial court denying his motion to set aside the November 12, 1999, consent agreement to enter into binding arbitration. In addition, although defendant's arguments are not clearly and concisely set forth, defendant also appears to suggest that the judgment of divorce itself should be set aside. Defendant variously asserts that he was not mentally competent to enter into the agreements and that a fraud on the court was perpetrated by his own attorney and plaintiff's attorney, working in collusion with each other to the detriment of defendant. Defendant contends that at the time the settlement agreement was signed, the pension plans had not yet been fully evaluated, he was under the impression that binding arbitration would still take place, and he was not fully apprised of the terms of the property division and the contents of the agreement. Defendant thus maintains that the division of pensions was inequitable and grossly favored plaintiff. Defendant also claims that in ruling on his motion, the trial court acted on the erroneous assumption that binding arbitration had actually occurred.

A trial court's decision on a motion to set aside a judgment or order should not be disturbed on appeal absent a clear showing of an abuse of discretion. *Heugel v Heugel*, 237

Mich App 471, 478; 603 NW2d 121 (1999); *Kowatch v Kowatch*, 179 Mich App 163, 167; 445 NW2d 808 (1989). An abuse of discretion exists when the result is so palpably and grossly violative of fact and logic that it evidences perversity of will or the exercise of passion or bias rather than the exercise of discretion. *Dacon v Transue*, 441 Mich 315, 329; 490 NW2d 369 (1992).

For a consent judgment to become effective, the parties must in fact consent. *Howard v Howard*, 134 Mich App 391, 397; 352 NW2d 280 (1984). Settlements arrived at by the parties and placed on the record in open court in the presence of counsel are entitled to a high degree of finality. *Tinkle v Tinkle*, 106 Mich App 423, 428; 308 NW2d 241 (1981). Thus, it is well established that courts are bound by property settlements reached through negotiations and agreement by parties to a divorce action, in the absence of fraud, duress, mutual mistake, or severe stress which prevented a party from understanding in a reasonable manner the nature and effect of the act in which he was engaged. *Quade v Quade*, 238 Mich App 222, 226; 604 NW2d 778 (1999); *Keyser v Keyser*, 182 Mich App 268, 269-270; 451 NW2d 587 (1990); *Calo v Calo*, 143 Mich App 749, 753; 373 NW2d 207 (1985); *Howard, supra* at 396. See, generally, MCR 2.612(C)(1)(a)-(f).

When a party contends that his consent, while actually given, was influenced by circumstances of severe stress, the standard to be applied is that of mental capacity to contract. *Howard, supra* at 396. The test of mental capacity to contract is whether the person in question possesses sufficient mind to understand, in a reasonable manner, the nature and effect of the act in which he is engaged. *Id*., citing *Star Realty, Inc v Bower*, 17 Mich App 248, 250; 169 NW2d 194 (1969). To avoid a contract, it must appear not only that the person was of unsound mind or insane when it was made, but that the unsoundness or insanity was of such a character that he had no reasonable perception of the nature or terms of the contract. *Id*.

Moreover, when a party to a consent judgment argues that his consent was obtained through duress or coercion practiced by his own attorney, the judgment will not be set aside absent a showing that the other party participated in the duress or coercion. *Id*. at 397.

In this case, it should be noted that during the course of the divorce proceedings, defendant was represented by several attorneys, each of whom was discharged by defendant. Defendant now insinuates incompetence, fraud, and collusion on the part of the parties' counsel. Defendant further represents that the divorce complaint caused him to suffer severe depression, suicidal thoughts, and a nervous breakdown. Defendant began treating with a psychiatrist in February 2000. In a letter to the trial court dated February 11, 2000, his psychiatrist recommended that the divorce proceedings be postponed because defendant was suffering from major depression. The trial court discounted this recommendation and the judgment of divorce was entered on February 18, 2000. In a follow-up letter dated December 31, 2001, the psychiatrist indicated to the court that "[a]t the time of the settlement conference and agreement, he could not make any legal decisions at all because of his severe depression with panic disorder."

On February 1, 2002, following a hearing concerning the above allegations, the trial court entered an order denying defendant's motion to set aside the consent agreement to enter into binding arbitration. Having presided over the case from its inception, the trial court concluded that defendant had been represented by competent counsel throughout the proceedings and that

he had failed to demonstrate that he was not mentally competent to enter into the settlement agreement. The court noted that the letters to the court from defendant's psychiatrist indicated that he did not seek treatment until February 2000, while the agreement to enter into binding arbitration occurred in November 1999 and the ensuing settlement negotiations occurred in January 2000. With regard to defendant's allegations of fraud, the trial court concluded that defendant's motion was not timely filed within one year of the judgment or order under MCR 2.612(C)(2).

Under the circumstances, we conclude that the trial court did not abuse its discretion in denying defendant's motion to set aside the consent agreement to enter into binding arbitration. As the trial court noted, the consent agreement to arbitrate was consummated in November 1999, long before defendant sought psychiatric care. Indeed, the February 11, 2000, letter indicates that the psychiatrist did not first see defendant until February 7, 2000, nearly one month after the parties reached a settlement during the arbitration process. Moreover, defendant has not presented adequate evidence demonstrating that his state of mind during the pertinent time period rose to the level of incapacity necessary to invalidate the consent agreement for lack of capacity to contract. *Howard, supra*. The trial court found that defendant was represented by competent counsel during the proceedings at issue, and there is no basis in the record indicating that this was not the case. Defendant's counsel never suggested to the court that defendant was incompetent.

Likewise, defendant's vague but pernicious allegations regarding lack of consent, fraud, and collusion are likewise wholly unsubstantiated in the record. There is no evidence of record that the value of the parties' pension plans was concealed or unknown at this stage of the proceedings, and the dearth of evidence in this regard also precludes appellate relief with regard to defendant's nebulous assertions that the consent judgment of divorce itself must be set aside on similar grounds. See *Dresden v Detroit Macomb Hosp Corp*, 218 Mich App 292, 300; 553 NW2d 387 (1996). Finally, a review of the motion hearing transcript indicates, contrary to defendant's contention, that the trial court was fully apprised and cognizant of the procedural history of the case and rendered its decision accordingly. We conclude that the trial court did not abuse its discretion in denying defendant's motion to set aside the consent agreement to enter into binding arbitration.

III

In Docket No. 230077, defendant contends that the trial court erred in issuing the post-judgment EDRO, which authorized the receiver to collect outstanding attorney fees, sanctions, and other monies owed to plaintiff pursuant to the judgment of divorce by attaching a lump sum from defendant's City of Detroit pension plan.[2] Defendant argues that the trial court exceeded its authority in entering the EDRO, which allegedly improperly invades defendant's interest in the pension. Defendant claims that state law, as well as federal law by analogy, prohibits the attachment of an interest in a pension fund to satisfy monetary obligations that are not the direct result of a domestic relations property settlement. Defendant further maintains that under the

[2] Defendant did not timely seek appellate review of the amount of attorney fees, sanctions, or costs assessed against him. These amounts included in the EDRO are not at issue in this appeal.

circumstances, the EDRO in question violates the provisions of the EDRO Act and the specific language of the City of Detroit pension ordinance and the judgment of divorce.

Statutory interpretation is a question of law that this Court reviews de novo. *DeVormer v DeVormer*, 240 Mich App 601, 605; 618 NW2d 39, 42 (2000). The primary goal of this Court is to determine and give effect to the intent of the Legislature. *Id*. In cases involving statutory construction, such as this one, courts look first at the language of the statute itself. *Id*. "[I]f the statutory language is clear and unambiguous, judicial construction is neither required nor permitted, and courts must apply the language as written." *Id*.

Consent decrees are interpreted and construed in the same manner as a contract: Where the terms are unambiguous, they are construed as a matter of law; but where the meaning is not clear the court may consider extrinsic evidence to determine the intent of the parties. *Beason v Beason*, 435 Mich 791, 798-799 n 3; 460 NW2d 207 (1990).

First, defendant contends that the EDRO in question should be deemed invalid because it was not entered at the same time as the divorce judgment and does not represent an award of a pension fund as part of the marital estate. Noting that property settlements are final and, as a general rule, non-modifiable, defendant argues that his pension cannot be used as a collection tool because to do so is inconsistent not only with the court's interest in seeking finality at the time of the divorce judgment, but also with the purpose of the EDRO Act. Defendant maintains that at the time of the judgment, the obligations in the EDRO did not exist and thus cannot be included in the EDRO relating back to the divorce judgment. Defendant cites *Mixon v Mixon*, 237 Mich App 159; 602 NW2d 406 (1999), for the proposition that an EDRO must be included with and issued at the same time as the parties' judgment of divorce. We disagree with defendant's assertions and his assessment of the *Mixon* decision.

The EDRO Act provides for the manner in which the City of Detroit pension plan or any other public employee retirement system can distribute a portion of a participant's pension benefits to an alternate payee. The EDRO Act defines a "domestic relations order" as:

> [A] judgment, decree, or *order* of a court made pursuant to the domestic relations law of this state and relating to the provision of alimony payments, child support, or *marital property rights* to a spouse of a participant under a judgment of separate maintenance, or to a *former spouse*, child, or dependent of a participant. [MCL 38.1702(c) (emphasis added).]

The EDRO Act clearly and unambiguously provides that the court's domestic relations order need not be a judgment but any "order" of the court. Moreover, a domestic relations order issued pursuant to the EDRO Act is appropriate if it relates to the "marital property rights" of a "former spouse." The reference to "former spouse" implies the Legislature intended that a court may enter an EDRO after the parties are divorced as a means of enforcing the parties' "marital property rights" pursuant to the judgment of divorce.

Defendant concedes that his City of Detroit pension plan, like all pensions, is part of the marital estate in a divorce proceeding. *Vander Veen v Vander Veen*, 229 Mich App 108, 110-111; 580 NW2d 924 (1998); MCL 552.18. Further, in Michigan, "once the attorney fee award is made in a divorce case, the award is treated the same as a property division and recovery may be

had, as in a property division, from any of the spouse's assets over which the court has jurisdiction." *Chisnell v Chisnell*, 149 Mich App 224, 234; 385 NW2d 758 (1986). Logic dictates that post-judgment attorney fees and sanctions incurred as a result of noncompliance by a spouse with the terms of the divorce judgment thus may be considered part of the marital estate and "marital property rights" of a spouse.

In the instant case, the trial court issued the EDRO to enforce, not modify, plaintiff's "marital property rights" established in the judgment of divorce. The EDRO specified that it was to be incorporated in the judgment of divorce and made a part thereof. Pursuant to the settlement agreement and judgment of divorce, defendant agreed to pay plaintiff $20,000 in attorney fees, $5,000 in personal property, and transfer a vehicle to her. Despite this agreement and his available cash assets, defendant refused to comply with either the judgment of divorce or any of the subsequent orders of the trial court. Defendant's blatant defiance of the court's orders ultimately resulted in the issuance of the EDRO. The resultant lump sum to be distributed to plaintiff from defendant's pension plan was inflated by additional fees and sanctions that would not otherwise have accrued if defendant had acted in a reasonable manner. Under these circumstances, we conclude that the EDRO in question validly related to and sought enforcement of the "marital property rights" of a "former spouse" within the meaning of the EDRO Act.

Defendant's reliance on *Mixon, supra*, to support his contention that the EDRO in this case is invalid because it was not entered concurrently with the judgment of divorce, is misplaced. The facts of *Mixon* are inapposite and the decision did not address whether a court may use an EDRO to enforce a judgment of divorce.[3] Indeed, nothing in either *Mixon* or the

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[3] In *Mixon*, the plaintiff/husband specifically requested that the trial court include an EDRO in the judgment of divorce to allow for the division of the plaintiff's municipal employee pension benefits with the defendant/wife. The court refused the husband's request to file an EDRO, and thus the parties' judgment of divorce did not refer to the entry of an EDRO but simply divided the plaintiff's pension pursuant to language contained within the judgment. On appeal, this Court held that the trial court erred by denying the plaintiff's request for an EDRO. Reading MCL 552.101(4), which requires a judgment of divorce to determine all rights of the husband and the wife in any pension, in conjunction with the EDRO Act, specifically MCL 38.1703, which requires the filing of an eligible domestic relations order with a public employee retirement system in order for a former spouse of a participant in such a retirement system to receive an awarded share of benefits, this Court stated:

> While MCL 552.101(4); MSA 25.131(4) does not explicitly require the trial court to include an EDRO in the judgment of divorce, we conclude that this section, when read in conjunction with the Eligible Domestic Relations Order Act, required the trial court to include an EDRO in the parties' judgment of divorce when requested by plaintiff. . . . . While the judgment of divorce in the present case awards defendant one-half of "plaintiff's pension benefits derived through his employment . . . from the date of marriage through the date of divorce," it neither qualifies as an EDRO nor requires the entry of an EDRO. Because plaintiff's pension cannot be divided without an EDRO that a court will need to enter at a future date, it cannot be said that the judgment of divorce

(continued…)

EDRO Act expressly or implicitly states that a court cannot effectuate enforcement of the terms of a judgment of divorce by using an EDRO to collect marital property from the pension of a "former spouse." We conclude that the trial court did not err by entering the EDRO authorizing plaintiff to obtain a distribution from her former spouse's pension to collect those amounts due to her pursuant to the judgment of divorce.

Next, defendant contends that the judgment of divorce expressly gave the pensions and annuities to each party "free and clear of any right, title, or claim" by the other; consequently, pursuant to the plain language of the judgment, plaintiff surrendered any claim against defendant's pension as part of the property settlement and "cannot now invade this island of refuge in order to obtain amounts otherwise ordered under the divorce judgment to her for attorney fees, sanctions, or receiver fees." Defendant argues that plaintiff must use the normal civil remedies available for collection because to permit attachment through the EDRO is tantamount to a modification of the judgment. We disagree.

As defendant notes, the judgment of divorce specified that his City of Detroit pension and annuity were awarded to him "free and clear of any interest, right, title, or claim of the Wife." While, ordinarily, "language in a divorce decree awarding one party the proceeds of a fund 'free and clear' of any claim by that party's spouse . . . operates to void a designation listing the spouse as the beneficiary," *Thomas v City of Detroit Retirement System*, 246 Mich App 155, 160; 631 NW2d 349 (2001), in the instant case the judgment of divorce also expressly awarded plaintiff a lien on all of defendant's property in the event that he failed to comply with its terms:

> The Husband shall pay the Wife Five Thousand ($5,000.00) Dollars to the Wife's attorney's office . . . within 30 days of the entry of the Judgment of Divorce as consideration to the Wife for her share of the personal property. The

(…continued)

> determined the parties' rights to the pension benefits as required by MCL 552.101(4); MSA 25.131(4). At most, the judgment in the present case defers a determination of the pension benefits awarded to defendant until a court enters the EDRO. As a result, we conclude that the trial court's judgment was neither authoritative nor conclusive in dividing the pension rights between the parties, and therefore did not determine their rights as required by statute.
>
> Furthermore, public policy demands finality of litigation in family law cases. . . . In furtherance of this policy, litigants should resolve disputes regarding the division of pension rights at the time of the divorce, rather than months or years later. The trial court in the present case acted contrary to this public policy of finality when it denied plaintiff's request for language requiring the entry of an EDRO in the judgment of divorce and opted to defer, rather than determine, the EDRO issue. Accordingly, we hold that the trial court erred in failing to address plaintiff's request for more appropriate language in determining the parties' rights to pension benefits, and we remand to the trial court with instructions to incorporate an EDRO into the judgment of divorce. [*Mixon, supra* at 165-167.]

> $5,000 is hereby a lien on behalf of the Wife against any and all of the Husband's property whether real, personal, tangible or intangible, and should the Husband fail to pay said amount in full to the Wife on or before the above-referenced date, then the Wife shall be entitled to utilize all the collection methods available under Michigan law to collect upon the lien.

The judgment of divorce similarly provided for the placement of a lien on defendant's property for attorney fees ("The amount of the attorney fees that the Husband now owes to the Wife is hereby a lien on behalf of the Wife against any and all of the Husband's property whether real, personal, tangible or intangible . . . .").

Moreover, as previously noted, the order for entry of the judgment of divorce reiterated the lien provisions, stating:

> Plaintiff shall have a lien against any and all of the defendant's real and personal property, whether tangible or intangible, *including his City of Detroit Pension and Annuity* until these amounts are paid in full and complete transfer of all remaining assets have been completed or until further order of the court. [Emphasis added.]

The trial court "retain[ed] jurisdiction to interpret and enforce any and all provisions of this Judgment of Divorce."

As this Court noted in *Walworth v Wimmer*, 200 Mich App 562, 564; 504 NW2d 708 (1993),

> When a court provides a lien on marital property, it impliedly grants money to one of the parties; a lien is a security interest for money owed by one party to the other. *Lawrence v Lawrence*, 150 Mich App 29, 33; 388 NW2d 291 (1986). A court possesses inherent authority to enforce its own directives. *Greene v Greene*, 357 Mich 196, 202; 98 NW2d 519 (1959). A divorce case is equitable in nature, and a court of equity molds its relief according to the character of the case; once a court of equity acquires jurisdiction, it will do what is necessary to accord complete equity and to conclude the controversy. *Schaeffer v Schaeffer*, 106 Mich App 452, 457; 308 NW2d 226 (1981). In addition, MCL 600.611; MSA 27A.611 provides circuit courts with jurisdiction and power to make any order proper to fully effectuate the circuit courts' jurisdiction and judgments.

In the instant case, we conclude that the trial court, effectively responding to the statutory mandate of MCL 552.101(4)(a) that each judgment of divorce shall determine all rights of the husband and wife in any pension, annuity, or retirement benefits, acted within its inherent authority to enforce the divorce judgment by issuing the EDRO where the express language of the judgment of divorce and accompanying order created a lien in favor of plaintiff against all of defendant's property, including his pension plans.

Defendant's next argument that the EDRO is invalid because the worth of the pensions was not evaluated prior to entry of the judgment of divorce is not supported by persuasive

authority. The EDRO Act does not address the valuation of a pension prior to distribution. In any event, the parties here reached a settlement agreement and consented to the distribution of property contained in the judgment of divorce. No trial occurred and thus, because the trial court was not required to engage in an equitable division of the marital assets, there was no need for it to value the pensions. Instead, these particular circumstances involve a fixed amount owed to plaintiff under the terms of the judgment of divorce. The receiver, unable to find any other collectible assets, accessed the money owed to plaintiff pursuant to the EDRO. The value of defendant's pension is immaterial to this inquiry except to the extent that there are sufficient funds to satisfy the sum owed to plaintiff.

Defendant next argues that the EDRO in this case is invalid under the EDRO Act because plaintiff filed the EDRO after defendant's "retirement allowance effective date." Defendant suggests that his "retirement allowance effective date" was November 1, 1998, which marked thirty years from the time defendant commenced employment with the City of Detroit.[4]

The EDRO Act requires that the parties in a domestic relations matter file an EDRO "before the participant's retirement allowance effective date," MCL 38.1702(e)(viii), although the act does not define this term. However, a letter, dated March 2, 2001, from legal counsel for the Board of Trustees of the General Retirement System of the City of Detroit to defendant's attorney, indicates that the retirement allowance effective date of defendant's pension occurs when he applies for retirement and begins to collect benefits:

> Pension Bureau staff determines effective retirement dates, but only after a member or former member of the Retirement System submits an application for retirement. . . . Mr. D'Ascenzo has still not applied for retirement. For whatever reason, Mr. D'Ascenzo has chosen not to apply for retirement at this time.
>
> Common sense provides that you can not have a retirement date unless you retire and you can't retire until you apply for retirement.

To date, defendant has not applied for retirement and thus his allowance effective date has yet to occur. Defendant mistakenly argues that his "retirement allowance effective date" is synonymous with his "earliest retirement date," which is defined in the EDRO Act as "the earliest date on which a participant meets all of the requirements for retirement under a retirement system except for termination of employment." MCL 38.1702(d).[5] Defendant's interpretation of the term "retirement allowance effective date" erroneously assumes that a spouse could never enter an EDRO in a divorce action when the participant spouse has become eligible to retire ("earliest retirement date"), but has chosen not to file for retirement as of the

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[4] Defendant was actually employed by the City for fourteen years.

[5] The EDRO Act discusses the "earliest retirement date" and provides that

> An EDRO may provide for the payment of a benefit to an alternate payee beginning on or after the participant's earliest retirement date but before the participant terminates employment as provided in this section. [MCL 38.1705(1).]

date of the divorce. Under defendant's theory, the "retirement allowance effective date" would occur on the date of retirement eligibility (the "earliest retirement date"), which contradicts both the plain language and purpose of the EDRO Act. Defendant's interpretation would prohibit numerous spouses from collecting their fair share of their spouse's pension during divorce proceedings even though their spouse does not collect retirement benefits – contrary to the intent of the EDRO Act. Instead, the "effective allowance date" serves to prevent entry of EDROs *after* the participant has started to collect his benefits because it would be difficult for pension plans to recalculate the benefits once the participant already receives the money.

In sum, while defendant may have reached his "earliest retirement date" in 1998, he has not reached his "retirement allowance effective date" because he has not filed for retirement or received any retirement benefits prior to the filing of the EDRO. We therefore conclude that plaintiff timely filed the EDRO prior to defendant's "retirement allowance effective date."

Next, contrary to defendant's assertion, the language of the EDRO Act contains no impediment to the distribution of pension benefits in lump sum form. The act does not expressly or impliedly preclude this method of distribution. Rather, it requires that the domestic relations order

> state[] the amount or percentage of the benefit to be paid to an alternate payee, or the manner under which the retirement system is to determine the amount or percentage of the benefit to be paid to an alternate payee. [MCL 38.1702(e)(iii).]

The determinative factor is whether the EDRO complies with the retirement system, i.e., the EDRO cannot require "the retirement system to provide a type or form of benefit not provided by the retirement system or a form of payment not provided by this act." MCL 38.1702(e)(v). In this regard, the City of Detroit pension plan, Chapter VI, Article VI, Part E, Section 1(b), provides in pertinent part that

> In addition, a member may elect to have all or part of his accumulated contributions paid to the members in a *single sum* or used to purchase an annuity contract from an insurance company of his choice . . . . [Emphasis added.]

However, the EDRO Act allows the retirement system to ultimately determine the validity of the EDRO in the context of the specific provisions of the City of Detroit pension plan. See MCL 38.1710.[6] Because the City of Detroit Pension Board has not yet ruled on the validity of the EDRO at issue, this issue is not ripe for our review.

Having reviewed the remainder of defendant's arguments raised on appeal, we conclude that his further challenges to the validity of the EDRO and related orders are without merit.

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[6] MCL 38.1710 provides in pertinent part that

> The retirement system shall, within a reasonable period of time after receiving a domestic relations order, determine if the domestic relations order is an EDRO under this act.

Affirmed.

/s/ Richard Allen Griffin
/s/ Janet T. Neff
/s/ Hilda R. Gage